

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HENRY MOSES MITCHELL,
aka HENRY C. HAYES,

Plaintiff,

v.

PENNINGTON, et al.,

Defendants.

Case No. [21-cv-06247-WHO](#) (PR)

ORDER OF SERVICE;

**ORDER DIRECTING
DEFENDANTS TO FILE A
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION;**

INSTRUCTIONS TO CLERK

INTRODUCTION

Plaintiff Henry Moses Mitchell, Jr. (aka Henry C. Hayes) alleges that his jailors interfered with his First Amendment right of the free exercise of religion by denying him religious textbooks that he ordered. His 42 U.S.C. § 1983 complaint containing these allegations is now before me for review pursuant to 28 U.S.C. § 1915A(a).

Mitchell has stated First Amendment claims against Pelican Bay State Prison Officers Pennington and Pearcey. All other claims and defendants are dismissed. Defendants shall file in response to the operative complaint either a dispositive motion, or a notice regarding such motion, on or before **May 23, 2022**.

STANDARD OF REVIEW

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1), (2). Pro se pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

1 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a
2 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
3 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
4 plausibility when the plaintiff pleads factual content that allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
6 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal
7 conclusions cast in the form of factual allegations if those conclusions cannot reasonably
8 be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55
9 (9th Cir. 1994).

10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
11 elements: (1) that a right secured by the Constitution or laws of the United States was
12 violated, and (2) that the alleged violation was committed by a person acting under the
13 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

14 DISCUSSION

15 Mitchell alleges that in January 2021 Pelican Bay Officers Pennington and Pearcey
16 violated his First Amendment right to the free exercise of religion by denying him
17 religious textbooks he ordered. (Compl., Dkt. No. 1 at 3-4.) When liberally construed,
18 Mitchell has stated claims against Pennington and Pearcey under the First Amendment for
19 interfering in his free exercise of religion.

20 CONCLUSION

21 For the foregoing reasons, the Court orders as follows:

22 1. The complaint (Dkt. No. 1), when liberally construed, states cognizable
23 claims against Officers Pennington and Pearcey, who are employed at Pelican Bay State
24 Prison.

25 2. The following defendants, both of whom apparently work at Pelican Bay
26 State Prison, shall be served: Officers Pennington and Pearcey.

27 Service on these defendants shall proceed under the California Department of
28 Corrections and Rehabilitation’s (CDCR) e-service program for civil rights cases from

1 prisoners in CDCR custody. In accordance with the program, the Clerk is directed to serve
2 on CDCR via email the following documents: the operative complaint (Docket No. 1), this
3 order; a CDCR Report of E-Service Waiver form; and a summons. The Clerk also shall
4 serve a copy of this order on the plaintiff.

5 3. No later than 40 days after service of this order via email on CDCR, CDCR
6 shall provide the court a completed CDCR Report of E-Service Waiver advising the court
7 which defendant(s) listed in this order will be waiving service of process without the need
8 for service by the United States Marshal Service (USMS) and which defendant(s) decline
9 to waive service or could not be reached. CDCR also shall provide a copy of the CDCR
10 Report of E-Service Waiver to the California Attorney General's Office which, within 21
11 days, shall file with the court a waiver of service of process for the defendant(s) who are
12 waiving service.

13 4. Upon receipt of the CDCR Report of E-Service Waiver, the Clerk shall
14 prepare for each defendant who has not waived service according to the CDCR Report of
15 E-Service Waiver a USM-205 Form. The Clerk shall provide to the USMS the completed
16 USM-205 forms and copies of this order, the summons and the operative complaint for
17 service upon each defendant who has not waived service.

18 5. On or before **May 23, 2022**, defendants shall file a motion for summary
19 judgment or other dispositive motion with respect to the claim(s) in the complaint found to
20 be cognizable above.

21 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
22 failed to exhaust his available administrative remedies as required by 42 U.S.C.
23 § 1997e(a), defendants shall do so in a motion for summary judgment, as required by
24 *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

25 b. Any motion for summary judgment shall be supported by adequate
26 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
27 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
28 qualified immunity found, if material facts are in dispute. If any defendant is of the

1 opinion that this case cannot be resolved by summary judgment, he shall so inform the
2 Court prior to the date the summary judgment motion is due.

3 6. Plaintiff's opposition to the dispositive motion shall be filed with the Court
4 and served on defendants no later than forty-five (45) days from the date defendants'
5 motion is filed.

6 7. Defendants shall file a reply brief no later than fifteen (15) days after
7 plaintiff's opposition is filed.

8 8. The motion shall be deemed submitted as of the date the reply brief is due.
9 No hearing will be held on the motion unless the Court so orders at a later date.

10 9. All communications by the plaintiff with the Court must be served on
11 defendants, or defendants' counsel once counsel has been designated, by mailing a true
12 copy of the document to defendants or defendants' counsel.

13 10. Discovery may be taken in accordance with the Federal Rules of Civil
14 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
15 Rule 16-1 is required before the parties may conduct discovery.

16 Plaintiff is reminded that state prisoners may review all non-confidential material in
17 their medical and central files, pursuant to *In re Olson*, 37 Cal. App. 3d 783 (Cal. Ct. App.
18 1974); 15 California Code of Regulations § 3370; and the CDCR's Department Operations
19 Manual §§ 13030.4, 13030.16, 13030.16.1-13030.16.3, 13030.21, and 71010.11.1.

20 Requests to review these files or for copies of materials in them must be made directly to
21 prison officials, not to the court.

22 Plaintiff may also use any applicable jail procedures to request copies of (or the
23 opportunity to review) any reports, medical records, or other records maintained by jail
24 officials that are relevant to the claims found cognizable in this order. Such requests must
25 be made directly to jail officials, not to the court.

26 11. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
27 Court informed of any change of address and must comply with the Court's orders in a
28 timely fashion. Failure to do so may result in the dismissal of this action for failure to

1 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

2 12. Extensions of time must be filed no later than the deadline sought to be
3 extended and must be accompanied by a showing of good cause.

4 13. A decision from the Ninth Circuit requires that pro se prisoner-plaintiffs be
5 given “notice of what is required of them in order to oppose” summary judgment motions
6 at the time of filing of the motions, rather than when the court orders service of process or
7 otherwise before the motions are filed. *Woods v. Carey*, 684 F.3d 934, 939-41 (9th Cir.
8 2012). Defendants shall provide the following notice to plaintiff when he files and serves
9 any motion for summary judgment:

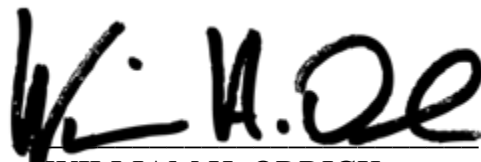
10 The defendants have made a motion for summary judgment by which they
11 seek to have your case dismissed. A motion for summary judgment under
12 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
13 case.

14 Rule 56 tells you what you must do in order to oppose a motion for summary
15 judgment. Generally, summary judgment must be granted when there is no
16 genuine issue of material fact — that is, if there is no real dispute about any
17 fact that would affect the result of your case, the party who asked for
18 summary judgment is entitled to judgment as a matter of law, which will end
19 your case. When a party you are suing makes a motion for summary
20 judgment that is properly supported by declarations (or other sworn
21 testimony), you cannot simply rely on what your complaint says. Instead,
22 you must set out specific facts in declarations, depositions, answers to
23 interrogatories, or authenticated documents, as provided in Rule 56(e), that
24 contradict the facts shown in the defendants’ declarations and documents and
25 show that there is a genuine issue of material fact for trial. If you do not
26 submit your own evidence in opposition, summary judgment, if appropriate,
27 may be entered against you. If summary judgment is granted, your case will
28 be dismissed and there will be no trial.

Rand v. Rowland, 154 F.3d 952, 962-963 (9th Cir. 1998).

IT IS SO ORDERED.

Dated: January 4, 2022



WILLIAM H. ORRICK
United States District Judge